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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/790,152	03/01/2004	Joseph N. Casey	SP-1311	9984

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SOLAE, LLC
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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/16/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/790,152

Applicant(s)

CASEY ET AL.

Examiner

Helen F. Pratt

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 February 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9, 11, 14, 15, 21-31 and 34 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1-9, 11, 14, 24-29, 31 and 34 is/are allowed.
- 6) ☒ Claim(s) 15 and 21-23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date. _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 15, 21-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dutilh (4,608,267).

Dutilh discloses a composition containing choline-fortified cereal, wheat bran and honey. The choline is used in the claimed amounts (abstract). Claim 15 differs from the reference in that the reference uses different cereals such as wheat. However, wheat is considered to be similar to the other cereals, especially as previously wheat was listed in the same Markush grouping with the claimed cereals, and no patentable distinction is seen between the various cereals and wheat. The reference discloses that the extruded product can be added to breakfast cereal or eaten with milk (col. 5, lines 1-2). The breakfast cereal can be from Applicants' specification does not exclude an extruded wheat bran product from their types of ready to eat cereals. Claim 15 has been amended to not include the cereal barley. Attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. No coaction of ingredients is seen in using particular grains. The particular grains are a matter of choice, since nothing unexpected comes from using the claimed grains. Therefore, it would have been obvious to make a composition containing choline as shown by Dutilh and which uses various cereal grains. .

Claims 21 and 22 further required that the cereal is flaked or puffed. However, the composition has been shown as above, and nothing has been shown that the composition could not have been puffed, especially as only two ingredients are claimed. The further ingredients as in claim 23 are well known ingredients found in cereals and nothing new is seen in their use. The reference discloses the use of honey (col. 6, lines 48-50), which is a sweetener. It is seen that the particular sweetener a matter of choice absent a showing of unexpected results using the

Art Unit: 1761

claimed sweetener. Therefore, it would have been obvious to use known ingredients to make the composition, and to flake or puff a cereal composition.

Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over CN 1271539A (Lu et al).

Lu et al. disclose an instant barley gruel containing lecithin in amounts of 1-5%, which has been extruded and puffed, then crushed (abstract). The claims differ from the reference in the use of 5% of the AI. However, nothing is seen that adding 5% lecithin would not have been within the claimed amount of the AI. Barley has now been excluded as one of the claimed grains. However, as above, referring to In re Levin, not each and every ingredient can be shown, and is not required unless there is a coaction of ingredients making a new product. Here, various grains can be used, and nothing such as a coaction of ingredients using the particular grains is shown. Therefore, it would have been obvious to make a cereal product containing the claimed ingredients, which contained lecithin in the claimed amounts.

Claims 15, 21, 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wullschleger (5227248).

Wullschleger discloses a ready to eat cereal product as in claims 15, 21, 23 containing 0.5 % choline chloride, which is seen to have been 5% of the adequate intake (col. 11, lines 25-70, col. 12, lines 1-25). Therefore, it would have been obvious to use known amounts of choline and to use it in a salt form.

Allowable Subject Matter

Claims 1-9, 11, 14, 24-29, 31, 34 are allowed.

ARGUMENTS

Applicant's arguments filed 2-9-07 have been fully considered but they are not persuasive.

Applicants argue that the reference to Dutilh discloses wheat bran and honey mixed with lecithin. However, claim 15 is a composition claim which uses open, comprising type language, and the reference is not limited to showing just wheat bran and honey. Breakfast cereal can be used with the extruded product which contains lecithin (col. 4, lines 65-70, col. 5, lines 1-2).

As to Ex. II being compared to Ex. 3 of Dutilh, claim 15 is not a product by process claim, and the method of making the composition is not given weight.

As to the reference to Lu et al., barley has been shown, and nothing is seen that is other grains cannot be used in its place.

Applicants argue as to Wullschleger et al. that the reference contains at least 25% psyllium. Claim 15 does not exclude the use of psyllium. In addition, the reference discloses the use of rice, corn and rye (col. 3, lines 23-35).

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory

Art Unit: 1761

action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-272-9305. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). Hp 3-14-07


HELEN PRATT
PRIMARY EXAMINER